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In The

Supreme Court of the United States

October Term, 1997

JOHN KNOX WALKUP, Attorney General of the State of Tennessee, ET AL.,

Petitioners,

v.

BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, ET AL.,

Respondents,

SHELBY COUNTY BOARD OF EDUCATION, ET AL.,

Intervenor Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the one-person, one-vote principle embodied in the Equal Protection Clause of the Fourteenth Amendment require the selective disenfranchisement of a subgroup of the residents of the local electoral jurisdiction defined and established by state law, based on a federal court's ad hoc estimation that the subgroup of residents lacks a sufficient "interest" in the decisions of the local governmental body being elected?

PARTIES TO THE PROCEEDING

The petitioners, who were defendants-appellants in the proceeding below, include John Knox Walkup, Attorney General of the State of Tennessee, a position held by Charles W. Burson at the inception of this case; Riley C. Darnell, Secretary of State of Tennessee; Brook Thompson, Election Coordinator of the State of Tennessee; and the Shelby County Election Commission and its members.

Respondents Shelby County, Tennessee, and the Board of County Commissioners of Shelby County, Tennessee, were plaintiffs-appellees below. Respondents Shelby County Board of Education and its members and a group of mayors of small municipalities in the area of Shelby County outside Memphis were intervenor plaintiffs-appellees below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 121 F.3d 244 (6th Cir. 1997) and is reprinted in the Appendix ("App.") to this petition at App. 1-17. The Sixth Circuit's Order denying petitioners' petition for rehearing and suggestion of rehearing en banc is reported at 127 F.3d 495 (6th Cir. 1997) and is reprinted at App. 59-61. The opinion of the United States District Court for the Western District of Tennessee, Western Division, is not reported; it is reprinted at App. 18-58.

STATEMENT OF JURISDICTION OF THE COURT

On July 29, 1997, the Court of Appeals for the Sixth Circuit entered the opinion and judgment from which review is sought. App. 2. The Sixth Circuit denied rehearing on September 25, 1997. App. 59. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Tennessee Code Annotated § 49-2-201(a)(1) provides, in pertinent part:

> Notwithstanding any other law to the contrary, there shall be a board of education elected by the people. . . . Members of county boards of education shall be residents of and elected from districts of substantially equal population established by resolution of the local legislative body. . . .

STATEMENT OF THE CASE

This is a voting rights case presenting a challenge to the constitutionality of the election provisions of Tennessee's Education Improvement Act of 1992, Tenn. Code Ann. § 49-2-201(a)(1), requiring the county-wide election of all county boards of education. In the decision below, the Court of Appeals for the Sixth Circuit held that this state law, as applied to such an election in Shelby County, Tennessee, constitutes an unconstitutional dilution of the votes of residents of the portion of Shelby County outside the city limits of Memphis, in violation of the one-person, one-vote principle embodied in the Fourteenth Amendment.

Statement of Facts

There are two public school systems in Shelby County, Tennessee: the Memphis City Schools, which provide elementary and secondary education to Shelby County children who live inside the city limits of Memphis, and the Shelby County Schools, which provide elementary and secondary education to children of Shelby County who live in the area of the county outside the Memphis city limits. There has been a Shelby County

school system since at least 1873 and, since 1923, it has been governed by a board appointed by the Shelby County Board of County Commissioners, which is itself elected by all of the voters of Shelby County. The Memphis school system was established by a private act of the Tennessee General Assembly in 1868 and has, since its creation, been governed by a board of directors elected by the voters who reside inside the city of Memphis. (R. 66: Stipulation, ¶¶ 1-6).

According to the 1990 U.S. Census, approximately 75 percent of the population of Shelby County lives in the city of Memphis. As of May 1, 1996, there were 512,245 registered voters in Shelby County, of whom 71.2 percent resided in Memphis. (R. 66: Stipulation, ¶¶ 28, 29).

The Tennessee General Assembly has authorized counties and municipalities to levy certain taxes for the local support of current school operations: the property tax for education (Tenn. Code Ann. § 49-3-315) and the local option sales tax (Tenn. Code Ann. § 67-6-701, et al.). Property taxes are collected from all the property owners in the county. Local option sales taxes are collected at the situs of the sales transaction. Under the laws that authorize these taxes, the distribution of the tax proceeds follows the children and not the situs of their collection. In counties such as Shelby that have more than one school system, the proceeds of the taxes levied by the county are divided between the school systems according to weighted full-time equivalent average daily attendance of children in each school system, not according to the geographic location of the property or sales transaction that gave rise to the tax. Tenn. Code Ann. § 49-3-315(a), 67-6-712. (R. 66: Stipulation ¶¶ 17, 19-21).

The Tennessee Constitution requires that county school board members either be appointed by the county commissioners or elected "by the people." Tenn. Const. Article XI, § 17. The Tennessee Supreme Court has held that, where county school board members are to be elected, that provision of the state constitution requires "election by all the qualified voters of the county, not [just] those residing beyond the corporate limits of a municipality."[1] In 1992, the Tennessee legislature passed the Education Improvement Act, a section of which mandates the election "by the people" of all county boards of education. Tenn. Code Ann. § 49-2-201(a)(1). In response to that legislation, which required a change in the method of selecting the members of the Shelby County Board of Education, from appointment to election, the Board of County Commissioners approved a seven single member district election plan; the seven districts cover all of Shelby County, including Memphis. (R. Stipulation: ¶¶ 10, 30-32).

Proceedings Below

Suit was instituted in the United States District Court for the Western District of Tennessee by Shelby County and the Board of County Commissioners, seeking to enjoin implementation of the county-wide election plan, claiming that it would dilute the votes of persons residing in the area of Shelby County outside Memphis, in violation of the principle of one-person, one-vote.[2]

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[1] *Southern v. Beeler*, 195 S.W.2d 857, 865 (Tenn. 1946).

[2] Subject matter jurisdiction of the District Court rested on 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(4), and 28 U.S.C. §§ 2201 and 2202.

Plaintiffs further alleged that, under any election plan comporting with Tenn. Code Ann. § 49-2-201(a)(1) and the Tennessee Constitution, the voting strength of non-municipal county residents would be so overwhelmed by the votes of municipal county residents as to leave them "with little or no chance to control their own school board." (R. 1: Complaint, ¶ 29). Permitted to intervene as plaintiffs were the Shelby County Board of Education and its members, as well as a group of mayors of small municipalities located in the area of Shelby County outside Memphis. (R. 18; R. 28).

In an Order entered on August 15, 1996, the District Court disposed of the case on cross motions for summary judgment, granting the plaintiffs' and plaintiff intervenors' motions. The court held that Tenn. Code Ann. § 49-2-201(a)(1), mandating the county-wide popular election of the Shelby County Board of Education, constitutes unlawful vote dilution in violation of the Equal Protection Clause of the Fourteenth Amendment, and enjoined implementation of the seven district election plan providing for such a county-wide election. App. 57.

The Court of Appeals for the Sixth Circuit affirmed the District Court's judgment, determining that the lower court has "properly concluded that the Constitution prevents the State of Tennessee from including Memphis voters in the electorate for the Shelby County Board of Education. . . . " App. 17. The Sixth Circuit viewed its previous decision in *Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995) as controlling its resolution of the appeal in this case. App. 3. In the context of a challenge to the county-wide election of a county school board, *Duncan*

set out a "substantial interest" test, identifying four factors considered to be determinative of a claim that the votes of a portion of the electorate would be unconstitutionally diluted by the votes of a subgroup of that electorate whose "interest" in the county schools is not sufficiently "substantial."[3] Reviewing application of the *Duncan* factors to this case, the Sixth Circuit agreed, as to the first factor, with the District Court's conclusion that Memphis voters do not have a sufficient financial interest in the county school system. That conclusion was based, specifically, on figures for two fiscal years reflecting a net flow of property and sales tax revenues from the area of Shelby County outside of Memphis toward the support of Memphis city schools. App. 13-14. As to the second *Duncan* factor, the Court of Appeals concluded that the overwhelming number of Memphis voters virtually assured that non-municipal county residents would not be able to control the membership of the county school board. App. 15. The remaining two factors – the number of crossover students between the two systems and the existence of any joint programs – were deemed insufficient to affect the weight of the first two factors. App. 15-17. The Sixth Circuit agreed with the conclusion of the lower court that Shelby County voters residing within the city limits of Memphis do not have a "substantial interest" in the affairs of the Shelby County Board of Education, so that

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[3] *Duncan* derived the factors in its "substantial interest" test from a series of cases arising from North Carolina and Alabama, including *Locklear v. North Carolina State Board of Elections*, 514 F.2d 1152 (4th Cir. 1975), *Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976), and *Sutton v. Escambia County Board of Education*, 809 F.2d 770 (11th Cir. 1987).

their inclusion in the electorate for members of that county school board would unconstitutionally dilute the votes of non-municipal county residents.

A timely petition for rehearing and suggestion for rehearing en banc were denied on September 25, 1997. App. 59.[4]

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's opinion presents an issue concerning the theoretical foundation of local voting rights jurisprudence that this Court has never directly addressed: does the principle of one-person, one-vote *require* the limitation of the franchise only to the subgroup of residents of a local political subdivision who are seen as primarily interested in and impacted by the decisions of the local governing body to be elected? That issue is central to the premise underlying the lower court's conclusion that the county-wide election of a county school board, as required by state law, constitutes an unconstitutional dilution of the voting strength of the "primarily interested" segment of the electorate in violation of the

[4] The separate concurring opinion to the Order denying the petition (Merritt, J.) suggests that the panel unnecessarily reached a federal constitutional issue. App. 60. With all respect, Judge Merritt's suggestion is based on a proffered interpretation of state law, and specifically Tenn. Code Ann. § 49-2-201, that is squarely at odds with and ignores Article XI, § 17 of the Tennessee Constitution and the Tennessee Supreme Court's definitive interpretation of that provision in *Southern v. Beeler*, 195 S.W.2d 857 (Tenn. 1946). *See* discussion, *infra* at p. 13.

principle of one-person, one-vote embodied in the Equal Protection Clause.

The concept of unconstitutional vote dilution reflected in the premise of a constitutionally mandated interest-based selective enfranchisement suggests the existence of a heretofore unknown "group voting right", by means of which the voting strength of a group presumably possessing distinctive interests is protected against "dilution" by the vote of another segment of the local electorate deemed by a federal court to possess less of an "interest." This "group right" to exclusive political power and representation by a subgroup of the residents of a state-defined electoral jurisdiction was never intended by the Equal Protection Clause. And, the analysis disregards and undermines the traditional deference, clearly recognized by this Court, to be afforded to state authority to shape the representational structure of local government.

The dangerous legacy left by the Sixth Circuit's one-person, one-vote analysis, if left unchecked by this Court, is manifest. The states' interests in structuring local government, determining representation in the governance of local governmental units, and defining local electoral jurisdictions will be subject to federal judicial intrusion based on the court's estimation of the sufficiency of interest of particular subgroups of the community. This danger is graphically illustrated by the consequences in this case of the Sixth Circuit's analysis.

The decision of the court below has reduced the existence of the fundamental right to vote in this context to a dependence on the imprecisions and variations of an

ad hoc balancing analysis whose factors, utilized in an effort to measure "interest", may weigh differently in each of the 32 Tennessee counties[5] that have one or more city or special school systems in addition to the county school system. Indeed, the weight of the various factors within a particular county may vary over time, shifting the balance.[6] This approach invites a succession of lawsuits potentially occurring each and every four year election cycle, so that various district courts and successive panels of the court of appeals can determine who among the residents of a particular county possesses the right to vote in county school board elections.

Moreover, the Sixth Circuit's decision will result in the disenfranchisement of 70% of the voters of Shelby County, in excess of 365,000 people,[7] excluding them

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[5] R. 66: Stipulation of Facts ¶ 41. Indeed, under *Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995), all residents of Coffee County, Tennessee, are included in the electorate for that county's school board, contrary to the result reached in this case.

[6] For example, the factor of the positive "net flow" of education funds from not-Memphis to Memphis, relied on in the court's analysis (App. at 13-14), varied as recently as 1992-93, when Memphis paid more than not-Memphis. (R. 59). The District Court expressly recognized that "the decision in this case rests upon current facts which in substance may change over time." App. 57 n. 16.

[7] R. 66: Stipulation of Facts, ¶ 29. The racial demographics of the group disenfranchised by the Sixth Circuit's decision is particularly troubling. The Court of Appeals has taken the vote away from the large number of African-American voters who make up the majority of registered voters within the city limits of Memphis. (R. 66: Stipulation of Facts, ¶¶ 28, 29, Exh. 2,3). The Sixth Circuit's Equal Protection analysis has limited the

from the election of the members of the county board of education, county officers who are responsible for the expenditure of millions of tax dollars paid by the disenfranchised voters. In Tennessee, a county school board has no power to appropriate money or levy county education taxes; it must submit its proposed budget to the County Commission, which must approve the budget and appropriate funds for the county school system. If the County Commission wishes to raise more money for education, it must do so by raising taxes, and the increase is paid by all of the residents of the county. Consequently, the budget decisions of the Shelby County Board of Education shape the amount of the county education taxes, which fund both city and county school systems, and which are paid by both municipal and non-municipal county residents. If a county board of education were to be elected only by county residents who live outside municipal limits, the school board would be accountable to only a portion of the voters who hold the purse strings, and voters living within municipal limits would be called upon to pay taxes for schools without any voice in the allocation and expenditure of that money by the county school board.[8]

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franchise to residents of the small segment of Shelby County in which the overwhelming majority of voters are white and caused the predominately minority population of Memphis, including approximately 185,000 African-American voters, to be the only group of city dwellers in the entire state who cannot vote for their county school board.

[8] From the perspective of the individual county property taxpayer residing in the city of Memphis, what matters is not the "net flow" of dollars as between school systems. What matters is the fact that the amount of property tax he or she will

In sum, the Sixth Circuit has decided an important question of federal law that has not been, but should be, directly addressed and resolved by this Court.

I. THE COURT OF APPEALS' DISREGARD OF THE DEFINITION OF ELECTORAL JURISDICTION ESTABLISHED BY STATE LAW, WHEN THE STATE'S DEFINITION OF JURISDICTION COINCIDES WITH THE GEOGRAPHIC BOUNDARIES OF THE GOVERNMENTAL UNIT AT ISSUE, CONFLICTS WITH THIS COURT'S DECISION IN *HOLT CIVIC CLUB V. CITY OF TUSCALOOSA*.

As an initial matter, this case cannot accurately be conceptualized as involving an expanded electorate – that is, as the state having extended the local franchise to nonresidents with no constitutional right to electoral participation. That framing of the case follows only from the Sixth Circuit's erroneous disregard, without analysis and without even passing acknowledgment of the deference to which it is entitled, of the state's designation of the electorate for the selection of members of a county school board, a county office, as consisting of all qualified residents of the entire county.[9] "In decision after decision,

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pay is directly affected by the size of the Shelby County education budget and the decisions of the Shelby County Board of Education administering that budget. It is for this reason that the Sixth Circuit's reliance on the "net flow" of education tax dollars is fundamentally misconceived, even on its own terms.

[9] In substituting its own definition of the relevant electoral jurisdiction as being the "Shelby County School District" – that is, that portion of Shelby County outside the city limits of Memphis – for the electoral jurisdiction mandated by state law –

this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens *in the jurisdiction." Dunn v. Blumstein,* 405 U.S. 333, 336 (1972) (emphasis added). The right conferred by the federal constitution is the right of a qualified resident to have his vote counted equally with the other voters in the geographical unit established by state law.

> *Once the geographical unit for which a representative is to be chosen is designated,* all who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

Gray v. Sanders, 372 U.S. 368, 379 (1963) (emphasis added). Thus, the initial touchstone for analysis of the one-person, one-vote principle rests in the designation of the relevant geographic electoral jurisdiction.

In this case, the geographical unit designated by state law – the relevant governmental entity for purposes of assessing the franchise for a county board of education – is the county. In Article XI, Section 17 of the Tennessee

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the entire county – the Sixth Circuit followed its earlier decision in *Duncan v. Coffee County,* 69 F.3d 88 (6th Cir. 1995). The *Duncan* decision was devoid even of an acknowledgment of state law on this point; rather, the *Duncan* court simply applied its own judgment as to the proper definition of the appropriate jurisdiction and, in so doing, created a geopolitical entity unknown to Tennessee law, the "Rural Coffee County School District." 69 F.3d at 93-94.

Constitution[10] , the State of Tennessee provided that the franchise for all popularly elected county offices must include all the voters of the county. The meaning of that provision was definitively resolved by the state's highest court more than fifty years ago. In *Southern v. Beeler*, 195 S.W.2d 857 (Tenn. 1946), the Tennessee Supreme Court considered a private act providing that only voters residing in the portion of Knox County outside the corporate limits of the city of Knoxville were eligible to vote for the members of the Knox County Board of Education. The state Supreme Court held that the private act violated Article XI, Section 17 of the Tennessee Constitution, finding that members of county school boards hold a county office created by the state legislature and that when such a county office is elected by the people, the Tennessee Constitution "contemplates the election by all qualified voters of the county, not [just] those residing beyond the corporate limits of a municipality [within the county]." *Id.* at 865.

In dismissing the state's definition of the electorate of county boards of education as coinciding with the geographic boundaries of the county at issue, the Sixth Circuit acted in complete disregard of the considerable deference to be afforded a state's authority in selecting the determinative local jurisdictional boundary line for voting rights purposes, and in direct conflict with this Court's decision in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

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[10] The Tennessee Constitution provides at Article XI, Section 17: "No county office created by the Legislature shall be filled otherwise than by the people or the County Court."

In *Holt Civic Club*, this Court rejected the efforts of the residents of a three-mile police jurisdiction circumscribing the corporate limits of Tuscaloosa, Alabama, to have the federal courts order the extra-territorial extension of the franchise in municipal elections to the residents of the police jurisdiction. The plaintiffs' theory was that the larger "police jurisdiction" was a service area impacted by the decisions of municipal officers. Under Alabama law the definition of the franchise for municipal offices coincided with the corporate limits of the municipality. In finding the geographic boundaries of the city of Tuscaloosa to be determinative, the Court in *Holt Civic Club* affirmed the strong presumption of constitutionality afforded a state's definition of voter qualifications for local offices that coincide with the geographic boundaries of the political subdivision at issue. 439 U.S. at 68-70. It squarely rejected the effort to have the federal court redefine the geographic contours of the electorate eligible to exercise the franchise, according to the court's own estimation of which citizens were substantially affected by, or sufficiently interested in, the decisions of the local governmental officers being elected.

Rather than affording any degree of deference to the state's authority to shape the representational structure of local government – here, by defining an electoral jurisdiction for the selection of county officers that coincides with the geographic boundaries of the county – the Sixth Circuit rejected the constitutional validity of such a county-wide franchise, finding that Tenn. Code Ann. § 49-2-201(a)(1), as applied in light of the Tennessee Constitution and Tennessee Supreme Court interpretation, "must give way to the requirements of the Supremacy

Clause when there is a conflict with the federal Constitution." App. 11. Inherent in the Sixth Circuit's conclusion that the county-wide election of the Shelby County School Board, as mandated by state law, violates the federal Constitution – specifically, that it constitutes unlawful vote dilution in violation of the Equal Protection Clause – is the premise that the principle of one-person, one-vote *requires* that the state limit the franchise to that group of citizens primarily interested in and affected by the decisions of the school board. The Sixth Circuit's effort to construct that premise from the concept of vote dilution and the principle of one-person, one-vote was flawed from its inception, as is shown by the discussion in the following section.

II. THE SIXTH CIRCUIT HAS ESTABLISHED A CONCEPT OF UNCONSTITUTIONAL VOTE DILUTION THAT DISTORTS THE PRINCIPLE OF ONE-PERSON, ONE-VOTE; EXPANDS THE PROTECTIONS OF THE EQUAL PROTECTION CLAUSE BEYOND THOSE INTENDED BY *REYNOLDS V. SIMS;* AND UNLEASHES UNWARRANTED FEDERAL JUDICIAL INTRUSION INTO STATE ELECTORAL PROCESSES.

This Court has repeatedly made it clear that a state may not selectively disenfranchise residents to give weight to certain interests. *Evans v. Cornman*, 398 U.S. 419, 423 (1970). All qualified residents "have a right to an equal opportunity for political representation. . . . 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington v. Rash*, 380 U.S. 89, 94 (1965).

Selective disenfranchisement of residents in a quest for "voters with a 'common interest in all matters pertaining to [the community's] government' is impermissible." *Dunn v. Blumstein*, 405 U.S. 333, 355 (1972).

The extension of the one-person, one-vote principle to local governments began with *Avery v. Midland County*, 390 U.S. 474 (1968), where the Court examined the Commissioners Court of Midland County, Texas, which had been districted to enable a rural minority to elect a majority of the body's members. In defense of this arrangement, it was argued that a county government could be structured to favor a certain constituency because that constituency had a particular stake in the county government's operation. In addition, reliance was placed on the fact that there was another local government in Midland County, the city of Midland, that served city residents, whereas the commissioners court was, in practice, the local government for the rural areas. *Id.*, at 483-485. In its review of this structure, the Texas Supreme Court had found that the functions that fell within the limited jurisdiction of the commissioners court disproportionately concerned the rural areas. 406 S.W.2d 422, 428. According to the state court, if representation on the county commissioners court were based solely on population countywide, "[t]he voice of the rural areas [would] be lost for all practical purposes." *Id.* The Texas court had, therefore, upheld the districting bias in favor of rural residents as being appropriate to assure rural residents effective representation in local government. This Court rejected that approach, focusing on the potential of the commissioners court to affect all county residents and recognizing the

presumption that a local government's action has a community-wide impact. 390 U.S. at 483-484. Thus, the Court refused to validate a structural preference in the electoral process for one group within the community, even a group, such as the rural residents, that might be more interested in or affected by the actions of the governing body at issue.

In 1969, this Court held that the Equal Protection Clause generally prohibits state and local governments from limiting voting rights when the limitation is based on a perception that certain classes of potential electors have less of an interest in the objects of government. In *Kramer v. Union Free School District*, 395 U.S. 621 (1969), this Court struck down, on Equal Protection grounds, a New York statute that limited voting in school district elections to district residents who were owners and lessees of taxable property within the district and to parents of children enrolled in district schools. The Court's inquiry focused on the asserted rationale for the selective disenfranchisement – that certain residents were so much more directly affected by and primarily interested in school board decisions that the state had a compelling interest in limiting the franchise to those residents. This Court concluded that the presumption is that all resident citizens of legal age have sufficient interest in local government to merit an equal vote. And *Kramer* embraced an expansive view of "interest" broad enough to encompass, in the context of that case, a childless resident who neither owned nor leased taxable real property but asserted that he, as a member of the community, had an interest in the quality of public education. *Id.* at 624-625.

In both *Avery* and *Kramer* the Court left open the possibility that "the State in some circumstances might limit the exercise of the franchise to those 'primarily interested' or 'primarily affected' [by the decisions of the governing body at issue]." *Kramer*, 395 U.S. at 632; *see also, Avery*, 390 U.S. at 483-484; *Hadley v. Junior College District*, 397 U.S. 50, 56 (1970) (It is "possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds [v. Sims]* might not be required.") The Court found such a case in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), concluding that the "water storage district, by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group, is the sort of exception to the rule laid down in *Reynolds*" which *Avery* and *Hadley* had left open. In *Ball v. James*, 451 U.S. 355 (1981), the Court again applied the interest-and-property exception to elections for special limited purpose governing bodies, finding that a water district, while nominally a public entity, was essentially a business enterprise created by and chiefly benefiting the specific group of enfranchised landowners. *Id.* at 368. Viewing a unit of government as a business enterprise freed it from application of the organizing principles for political bodies – universal adult resident enfranchisement and equal population representation – and validated governance limited to those who could be seen as investors.

There can, of course, be no argument that a county school board falls within the *Salyer-Ball* "special limited

purpose" exception. Such an argument is foreclosed by *Hadley v. Junior College District*, which recognized that education "has traditionally been a vital governmental function and [that] trustees [of a junior college district], whose election the State has opened to all qualified [district] voters, are governmental officials in every relevant sense of that term." 397 U.S. at 56. This Court refused to draw a constitutional distinction on the basis of the "purpose of the election." "While there are differences in the powers of [a school board member and a state legislator], the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process." *Id.* at 54-55. "[T]he guarantee of equal voting strength for each voter applies in all elections of governmental officials." *Id.* at 58. *See also, Salyer*, 410 U.S. at 728-729 (recognizing the provision of schools to be a general public service); *Ball v. James*, 451 U.S. at 366 (characterizing the "operation of schools" as a "normal function[ ] of government.")

And, of even more fundamental significance, whether or not such limitations on voting rights might be *permitted* in certain circumstances, the petitioners are aware of no decision of this Court that has determined or contains even implicit support for the proposition that selective disenfranchisement of a subgroup of the electorate deemed by a federal court not to possess a sufficiently substantial "interest" is *required* by the principle of one-person, one-vote that gives meaning to the concept of "vote dilution."

The right guaranteed by the Equal Protection Clause as interpreted in *Reynolds v. Sims*, 377 U.S. 533 (1964) is "the right of each voter to 'have his vote weighted

equally with those of all other citizens.' " *Mobile v. Bolden*, 446 U.S. 55, 78 (1980). In *Reynolds*, the Court implicitly viewed population equality as the method by which the value or weight of the vote among citizens was to be equalized. The one-person, one-vote principle of *Reynolds* "recognized that a voter's right to 'have an equally effective voice' in the election of representatives is impaired where representation is not apportioned substantially on a population basis." *Mobile*, 446 U.S. at 78. *But, where representation is apportioned substantially on a population basis, it is "obvious that nobody's vote has been 'diluted' in the sense in which that word was used in the Reynolds case." Id.* (emphasis added).

It is true that the Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters. *See Dunn v. Blumstein*, 405 U.S. at 336; *Reynolds v. Sims*, 377 U.S. at 576. "But this right to equal participation in the electoral process does not protect any 'political group', however defined, from electoral defeat." *Mobile v. Bolden*, 446 U.S. at 77. "The Equal Protection Clause . . . does not require [that a 'political group' be afforded] proportional representation as an imperative of political organization." *Id.* at 75-76. And, the mere fact that a particular apportionment scheme makes it more difficult for a particular group to elect representatives of its choice does not render that scheme constitutionally infirm under the Equal Protection Clause. *Davis v. Bandemer*, 478 U.S. 109, 131-132 (1986).

There is no claim in this case of unconstitutional vote dilution arising from malapportionment, no claim of an inequality of population among the seven voting districts drawn across the entire county. Representation on the

Shelby County School Board being apportioned substantially on a population basis, it is "obvious that nobody's vote has been 'diluted' in the sense in which that word was used in . . . *Reynolds*. . . . " *Mobile v. Bolden, Id.* at 78. The individual right of each county voter to have his or her vote weighted equally with the vote of all other citizens has not been impaired. Moreover, this case involves no challenge to an alleged dilution of the voting strength of identifiable racial or partisan political groups in the voting population, the only group voting rights recognized by this Court as entitled to constitutional protection against dilution. *See White v. Regester*, 412 U.S. 755 (1973); *Davis v. Bandemer*, 478 U.S. 109 (1986). The essential complaint here is that the challenged voting structure – a county-wide election process that counts all votes as equal – nevertheless adversely affects the ability of the "group" of voters assertedly "primarily interested" in the operation of the county school board – that is, non-municipal county residents – to elect the board members of their choice.[11] The Equal Protection Clause provides no

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[11] In defining the "primarily interested" voters as being the residents of the area of Shelby County outside the city limits of Memphis and the insufficiently "interested" voters as being the residents of Memphis, the Sixth Circuit's analysis results in the same imprecision condemned by this Court in *Kramer v. Union Free School District*. What was dispositive in *Kramer* was the failure of the selective enfranchisement classifications to meet a requisite "exacting standard of precision", in that they permitted inclusion of residents with a remote and indirect interest in school affairs and excluded others with a distinct and direct interest. 395 U.S. at 632. The limitation of access to the franchise for the Shelby County Board of Education that has been imposed by the decision below includes within that electorate a childless non-municipal resident who pays no

shelter for a claim of such dimension. *See Mobile v. Bolden; Davis v. Bandemer.* It exceeds the limit of constitutionally secured group voting rights currently defined by this Court and the parameters of the right to equal participation in the electoral process conferred by the Equal Protection Clause.

The Sixth Circuit has construed the principle of one-person, one-vote, in the context of a vote dilution claim, to require a state to limit the franchise to a subgroup of citizens residing within the boundaries of a political subdivision defined by that state, in order to give exclusive representation in the governance of local governmental affairs to a constituency limited to that portion of the community that is, in the estimation of a federal court, primarily interested in and primarily affected by the actions of the elected governing body. That view of equal protection principles would transform federal courts into super-legislatures, substituting their view for the judgment of the state with respect to the representational structure of local governmental units. Further, a one-person, one-vote principle that requires a precise and determinative dependency between resident enfranchisement and the primary impact of government action is not suggested by this Court's existing local voting rights

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property tax, yet excludes a property owner in Memphis whose tax burden is directly affected by changes in the property tax imposed to fund schools county-wide. Also excluded are city residents who, like the plaintiff in *Kramer*, have an interest in the quality of public education. Such residents were found in *Kramer* to be sufficiently affected by the decisions of the local school board to make the denial of their franchise a violation of the Equal Protection Clause.

jurisprudence and is not consistent with current local governmental structures throughout the nation.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0228P (6th Cir.)
File Name: 97a0228p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, et al.,	)	
Plaintiffs-Appellees,	)	
SHELBY COUNTY BOARD OF EDUCATION; HERMAN COX, et al.,	)	No. 96-6278
Intervenor Plaintiffs-Appellees,	)	
v.	)	
CHARLES W. BURSON, Attorney General & Reporter of Tennessee, RILEY C. DARNELL, Secretary of State of Tennessee; BROOK THOMPSON, Election Coordinator of the State of Tennessee; and the SHELBY COUNTY ELECTION COMMISSION, including O.C. PLEASANT, JR., Chair, DAVID LILLARD, Secretary, GREGORY DUCKETT, Member, ANTHONY KING, Member, and MYRA STILES, Member,	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 96-02491 – Jerome Turner, District Judge.

Argued: April 29, 1997

Decided and Filed: July 29, 1997

Before: NELSON and NORRIS, Circuit Judges; COHN, District Judge.*

COUNSEL

ARGUED: John L. Ryder, APPERSON, CRUMP, DUZANE & MAXWELL, Memphis, Tennessee, Richard L. Winchester, Jr., THE WINCHESTER LAW FIRM, Memphis, Tennessee, Lewis R. Donelson, III, BAKER, DONELSON, BEARMAN & CALDWELL, Memphis, Tennessee, for Appellee. Rachel L. Steele, OFFICE OF THE ATTORNEY GENERAL OF TENNESSEE, Nashville, Tennessee, for Appellant. Clifford D. Pierce, Jr., WYATT, TARRANT & COMBS, Memphis, Tennessee, for Amici Curiae. **ON BRIEF:** Brian L. Kuhn, FARRIS, MATHEWS, GILMAN, BRANAN & HELLEN, Memphis, Tennessee, John L. Ryder, APPERSON, CRUMP, DUZANE & MAXWELL, Memphis, Tennessee, Donnie E. Wilson, SHELBY COUNTY ATTORNEY'S OFFICE, Memphis, Tennessee, Richard L. Winchester, Jr., R. Lee Winchester, THE WINCHESTER LAW FIRM, Memphis, Tennessee, Lewis R. Donelson, III, BAKER, DONELSON, BEARMAN & CALDWELL, Memphis, Tennessee, for Appellee. Rachel L. Steele, OFFICE OF THE ATTORNEY GENERAL OF TENNESSEE, Nashville, Tennessee, for Appellant.

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* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

ALAN E. NORRIS, Circuit Judge. Defendants appeal from the judgment of the district court holding that the election provisions of Tennessee's Education Improvement Act ("EIA"), as applied in Shelby County, Tennessee, violate plaintiffs' rights under the Fourteenth Amendment to the United States Constitution. This court has recently resolved a similar challenge to the EIA's election provisions in *Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995), and our decision in that case controls the resolution of this appeal. While we held in *Duncan* that the EIA's election provisions were not unconstitutional as applied in Coffee County, application of the test established in that case leads us to conclude that the district court was correct in concluding that the election provisions are unconstitutional as applied in Shelby County. Accordingly, we affirm.

I.

Shelby County, Tennessee, is comprised of two separate and distinct public school districts: the Memphis City Schools and the Shelby County School District. The Memphis City Schools provide elementary and secondary education to students residing within the City of Memphis,[1]

[1] The Memphis school system was established by a private act in 1868, and its geographical boundaries are coterminous with the boundaries of the City of Memphis. Since its creation, it has been governed by a board of directors elected by persons who live in the city.

while the Shelby County School District does the same for students residing in all of the parts of Shelby County which are not within Memphis city limits. Until recently, the members of the Shelby County Board of Education were appointed by the Board of County Commissioners of Shelby County.

According to the parties, the Tennessee Constitution, as construed by the state's highest court, requires that all popularly elected county officials, including county school board members, be elected by all voters within the county. *See* Tenn. Const. Article XI, § 17; *Southern v. Beeler*, 195 S.W.2d 857, 865 (Tenn. 1946). In addition, the Tennessee legislature, by adopting the EIA, mandated that "[n]otwithstanding any other law to the contrary, there shall be a board of education elected by the people." Tenn. Code Ann. § 49-2-201. In order to comply with both the legislative mandate and the Tennessee Supreme Court's interpretation of the state's constitution, the Board of County Commissioners of Shelby County enacted a plan ("Plan C") which provided that members of the Shelby County Board of Education be elected from seven single member districts throughout the entire county. As a result, residents of the City of Memphis may vote in the Shelby County Board of Education elections even though their children attend school in a different system.

According to the 1990 United States Census, 826,330 people reside in Shelby County. Of that number, 618,289 reside within the City of Memphis, thus accounting for

74.8% of the county's population.[2] This overwhelming numerical dominance of Memphis residents over non-Memphis residents in the county is reflected in the make-up of the voting districts in Plan C. The percentage of Memphis residents residing in each district is as follows:

	Memphis Residents
District 1	71.6%
District 2	92.2%
District 3	88.6%
District 4	71.5%
District 5	62.9%
District 6	100.0%
District 7	33.1%

Thus, under Plan C, Memphis residents form a substantial voting majority in six out of the seven voting districts.[3]

On May 3, 1996, Shelby County and the Board of County Commissioners ("plaintiffs") filed a complaint in federal district court challenging the constitutionality of

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[2] That ratio appears not to have changed since the 1990 census, if voter registration figures are any indication. As of May 1, 1996, there were 512,245 registered voters in Shelby County. Of that number, 365,240 live in Memphis, accounting for 71.2% of all county voters.

[3] The Board of County Commissioners, which adopted Plan C in accordance with its understanding of state law mandates, nevertheless had doubts regarding the validity of Plan C under the federal Constitution. Accordingly, the Board adopted an alternative plan ("Plan A") to be implemented in the event that Plan C was ruled unconstitutional. Under Plan A, the seven single member districts would cover only that area of Shelby County that is outside the city limits of Memphis, and only residents of that area would vote in the school board elections.

Plan C and seeking declaratory and injunctive relief. They maintained that Plan C violates the one person, one vote principle embodied in the Equal Protection Clause of the Fourteenth Amendment, in that it would unconstitutionally dilute the votes of those residents served by the Shelby County School District, leaving them "with little or no chance to control their own school board." A group of small town mayors from the area served by the Shelby County School District and the Shelby County Board of Education intervened, asserting essentially the same constitutional objections to Plan C as the plaintiffs. Relying primarily upon our decision in *Duncan*, the district court concluded that Plan C was unconstitutional, and enjoined its implementation. This appeal followed. We review the district court's findings of fact for clear error, and its conclusions of law de novo.

II.

In *Duncan*, voters in a rural county school district challenged the election provisions of the EIA, asserting that the county-wide election of local school boards, as applied in Coffee County, violated the Fourteenth Amendment and the one person, one vote principle. Coffee County is divided into three separate school districts. The first two districts include the residents of the cities of Tullahoma and Manchester. The third district consists of those people who live in the remaining areas of the county outside the two cities ("Rural Coffee County"). *Duncan*, 69 F.3d at 90. Under an election plan adopted in response to the EIA, the Coffee County Commission reapportioned its school board. Of the seven available seats, two were completely within the City of Tullahoma; two

were mixed between the City of Tullahoma and Rural Coffee County; one was totally within Manchester; one was mixed between Manchester and Rural Coffee County; and one was solely within Rural Coffee County. *Id.* at 91. The residents of Rural Coffee County claimed that this arrangement unconstitutionally diluted their votes in Rural Coffee County School District elections.

After noting that neither the United States Supreme Court nor this court had ever directly addressed the issue presented in *Duncan,* we noted there that the Supreme Court's extensive voting rights precedents nevertheless set forth a number of basic principles to guide our analysis. *Id.* at 92. "First, 'the conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.' " *Id.* (quoting *Gray v. Sanders,* 372 U.S. 368, 381 (1963)). Moreover, an outright ban on the franchise is not the only manner in which a citizen's right to vote may be infringed upon. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* (quoting *Reynolds v. Sims,* 377 U.S. 533, 555 (1964)). Finally, we noted that where a citizen can demonstrate that he lives in the relevant political jurisdiction, there is a strong presumption that he is entitled to vote in its elections. Exclusion of such a citizen from the franchise is subject to strict scrutiny, and will only be upheld upon a showing of a compelling state interest. *Id.* at 93 (citing *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969)).

Relying upon this latter principle, Coffee County contended that it was required to include residents of Tullahoma in the elections at issue, because the "relevant geopolitical entity" for purposes of the one person, one vote analysis was all of Coffee County and because neither the county nor the state had a compelling state interest in excluding them. We held, however, that the relevant geopolitical entity for purposes of the one person, one vote analysis is the school district, not the entire county. *Id.* at 93 (citing *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("a citizen has a constitutionally protected right to participate on an equal basis with other citizens *in the jurisdiction*")). Thus, since Tullahoma residents did not reside within the relevant geopolitical entity, their inclusion in the electorate was not mandatory. "The Supreme Court has clearly stated that '[n]o decision of this court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions.' " *Id.* at 94 (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68 (1978)).

Although the inclusion of Tullahoma residents in the electorate for the rural district's school board was not constitutionally required, we went on to note that this does not mean that the state and county could not, as a matter of policy, choose to include them. *Id.* They may do so, so long as the votes of those who do reside within the relevant geopolitical entity are not unconstitutionally diluted. *Id.* We held that

> the benchmark for determining whether the inclusion of "out-of district" voters in another district's elections unconstitutionally dilutes

> those votes is whether the decision is irrational. A decision to include "out-of-district" voters in the election is not irrational if . . . those voters have a substantial interest in the . . . election.

Id. The factors to be considered in determining whether the out-of-district voters meet this substantial interest test include: (1) the degree to which one district is financing the other; (2) the voting strength of the out-of-district voters; (3) the number of, or potential for, crossover students; and (4) the existence of any joint programs. *Id.* at 96.

In applying these factors, we first noted that Tullahoma residents provided significant financial support to the Rural Coffee County School District. The facts showed that Tullahoma contributed $378,940 and $644,279, respectively, from the property and local option sales tax it collected to the Rural Coffee County School District. *Id.* at 91, 96. The total contribution of over one million dollars accounted for 7.28% of the rural district's total budget, and 21% of all local funds spent there. *Id.* at 96-97. We concluded that

> where, as here, a city provides a substantial amount of its own sales and property taxes to a neighboring school district, and where those funds make up a sizeable portion of the recipient's budget, the decision to make the city residents eligible to vote in the county school board elections is supported by a substantial interest and is therefore not wholly irrational.

Id. at 97.

We turned next to the voting strength of the out-of-district residents. Even if the out-of-district residents

have a substantial interest in district elections, "[w]here the government allocates the franchise in such a manner that residents of a separate area have little or no chance to control their own school board, there may be grave constitutional concerns." *Id.* We concluded, however, that given the apportionment of seats on the Coffee County School Board, there was only the slimmest possibility that Tullahoma residents will ever control the school board, and that they could do so only if the Rural Coffee County residents acquiesced in such control. *Id.*

With regard to crossover students, we concluded that the number of Tullahoma residents enrolled in the rural school district was minimal. Although Tennessee law created at least the potential for more crossovers, we concluded that this factor was not a strong point for either side. *Id.* Finally, we concluded that the lack of any joint programs between the city and rural school districts favored the position of the rural district voters. *Id.* Taking all of these factors into account, particularly Tullahoma's significant financial support of the rural schools and the minimal chance that city residents will ever control the rural school board, we held that the county-wide election of local school boards was not unconstitutional as applied in Coffee County.

III.

In applying the *Duncan* factors to this case, the district court found that the City of Memphis did not provide significant financial support to the Shelby County School District; that the overwhelming voting power of

the out-of-district Memphis residents virtually guaranteed that out-of-district residents would control the Shelby County Board of Education; that the number of actual crossover students was minimal, and the potential for additional crossovers was severely limited by a long-standing desegregation order; and that there were, at most, a few relatively minor joint programs between the districts. Accordingly, the district court concluded that the county-wide election of local school board members under Plan C was unconstitutional as applied in Shelby County and enjoined its implementation.

On appeal, defendants initially contend that because the Tennessee Constitution requires that local school board members be elected county wide, the district court erred in not deferring to state law in defining the relevant geopolitical entity. However, state constitutions must give way to the requirements of the Supremacy Clause when there is a conflict with the federal Constitution. *Reynolds v. Sims*, 377 U.S. 533, 584 (1964); U.S. Const. Art. VI cl. 2 ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). Accordingly, the district court properly followed *Duncan*, which holds that the relevant geopolitical entity for purposes of the one person, one vote analysis in cases such as this is the school district, not the entire county. *Duncan*, 69 F.3d at 93.[4] Likewise, *Duncan* clearly repudiates

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[4] Defendants and amici curiae also argue that *Duncan* is not controlling in this case since it did not involve the issue of the dilution of minority votes, and assert that this case does present such an issue. In *Duncan*, we noted that the case before us

defendants' suggestion that the inclusion of Memphis residents in the electorate for Shelby County Board of Education members is constitutionally required. *Id.* at 93-94.

Defendants also challenge the district court's application of the *Duncan* factors to this case, asserting that Memphis residents do in fact have a substantial interest

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involved no claim of minority vote dilution. *Duncan*, 69 F.3d at 95 n.4. This footnote provides no basis for distinguishing *Duncan* from the instant case, however, since this case likewise involves no minority vote dilution. As *Duncan* makes clear, city voters have no constitutional right to participate in the elections of outlying areas since they do not live in the relevant geopolitical entity. *Id.* at 93-94. The issue in *Duncan* was whether it was nevertheless constitutionally permissible to include them, and we noted that there was no problem of minority vote dilution in doing so in that case since there were more blacks in the out-of-district area than in the school district. Thus, minority votes were not diluted – the number of minority votes in the electorate actually increased.

The potential problem alluded to in this footnote is the issue of whether the decision to expand the electorate to include out-of-district voters dilutes minority votes. Such a case would be presented, for example, if a city's electorate was expanded to include white suburban or rural areas in order to prevent a black majority in an urban area from controlling their own local government. However, this case is different. As *Holt* and *Duncan* make clear, the one person, one vote rule has never been extended beyond the borders of the relevant geopolitical entity. As such, dilution concerns are simply not implicated in a decision *not to expand* the electorate. Put another way, black voters in Memphis cannot suffer from dilution of their votes based upon a refusal to include them in the Shelby County Board of Education elections, since they have no constitutional right to vote in these elections in the first place – they have no vote to dilute.

in Shelby County Board of Education elections. In *Duncan,* we determined the financial interest of Tullahoma residents based upon the amount of property and sales tax revenues they generated and then allocated to the rural school district. These figures revealed a net flow of over one million dollars from the city to the rural area. Here, the same analysis reveals that Memphis residents do not finance the Shelby County School District, and that the small towns are, in fact, making a net transfer into Memphis.

In counties that have more than one school system, such as Shelby County, Tennessee law requires that county property taxes collected for the support and maintenance of schools be divided between the school districts pursuant to a formula based upon school population. In fiscal year 1994-95, the total amount of school property taxes collected in all of Shelby County was $125,215,344. Of that amount, Memphis residents contributed $81,828,227. Memphis schools, however, received $88,687,780 in property tax revenues under the allocation formula. Conversely, residents of the area served by the Shelby County School District contributed $43,387,117 in school property taxes, yet their schools were allocated only $36,527,564. Thus, of the school property taxes paid by residents of the areas outside of Memphis, $6,859,553 went toward the support of Memphis City Schools.

Disbursement of sales tax revenues for school purposes is likewise based upon the school population formula. The portion of the local option sales tax collected in Memphis in 1994-95 and allocated to schools was $76,847,701. Of that amount, Memphis City Schools received only $73,549,674. Conversely, the amount of

sales taxes collected in the areas outside of Memphis and allocated to schools was $27,036,020, but the Shelby County School District received $30,334,047 in sales tax revenues. Thus, of the school sales taxes paid in Memphis, $3,298,027 went toward the support of the Shelby County School District.

The net result of these calculations is that taxpayers in the areas outside of Memphis contributed approximately $3.5 million to the support of Memphis schools during fiscal year 1994-95. Figures for fiscal year 1993-94 show a similar result. Thus, unlike *Duncan*, where city residents demonstrated a substantial interest in the rural school district by virtue of a net transfer of funds from the city to the rural schools, here the transfer of funds is in the opposite direction. Accordingly, the district court was correct in determining that Memphis voters do not have a financial interest that warrants their inclusion in the Shelby County Board of Education electorate under the first *Duncan* factor.[5]

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[5] Other financial data considered by this court in *Duncan* also clearly supports this conclusion. The *Duncan* court also found persuasive the fact that of the rural district's property tax expenditures, fully 14.5% came from transfers from the city. As noted, there is no such transfer here – no portion of the Shelby County School District's property tax expenditures came from transfers from Memphis. The *Duncan* court also noted that the net transfer of property and sales tax revenues from the city to the rural area accounted for over 7% of the entire budget of the rural school district, and 21% of its local revenues. Here, again, there is no such net transfer from the city, so no portion of the Shelby County School District's total budget or local revenues are attributable to Memphis. Finally, it should be noted that defendants offered evidence that in fiscal year 1992-93, there

The second *Duncan* factor – voting strength of the non-resident voters – also clearly favors plaintiffs in this case. As noted, under Plan C, Memphis residents constitute a majority in six of the seven school board districts. These majorities are overwhelming, ranging from 63% to 100%, virtually guaranteeing that out-of-district residents will exercise control of the board. Defendants contend that this arrangement presents no constitutional dilemma since, under another section of the EIA, Memphis residents would be ineligible to serve as members on the board. *See* Tenn. Code Ann. § 49-2-201(c). However, the one person, one vote analysis does not focus upon the place of residence of officeholders. Rather, the focus of the analysis is on the "dilution of the weight of a citizen's vote." *Duncan*, 69 F.3d at 92 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Plan C would unconstitutionally dilute the votes of residents of the Shelby County School District by placing the overwhelming majority of ballots in the hands of out-of-district voters.

The third *Duncan* factor – the number of, or potential for, crossover students – likewise favors plaintiffs. The number of actual Memphis residents who attend Shelby County schools is minimal, accounting for less than one percent of county students. Moreover, the majority of these students are only deemed crossover students because Memphis recently annexed the small town in

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was a net transfer of $310,826 from Memphis into the Shelby County schools. The district court noted, however, that this is an insignificant amount standing alone, and particularly so in light of the much larger net transfers in the other direction in more recent years.

which they reside. As a result, the students continue to attend the same county school as they have attended in the past, but they are now Memphis residents. However, within seven years the Shelby County School District will turn over full ownership and operation of that particular school to the Memphis City Schools, thus eliminating these "crossover" students.

Most of the remaining crossover students attend Shelby County schools under a rule which allows teachers who began working for the school system prior to 1981 to send their children to Shelby County schools regardless of where they reside. Only 106 students, or 0.23% of all county students, attended county schools under this rule during the 1995-96 school year. The number of this type of crossovers will also inevitably dry up over time, as the number of eligible teachers diminishes. Also, as the district court pointed out, the potential for crossovers from any other sources is severely restricted by a desegregation order.

The final *Duncan* factor is the existence of any joint programs. The parties stipulate that the two school districts have agreed that the county will build and operate a school in the area recently annexed by Memphis; that the new school will serve residents of both areas; and that its operation and ownership will eventually be transferred to the Memphis City Schools. Beyond that, defendants can point only to a number of volunteer or extracurricular activities engaged in by residents of both districts, such as the "Homework Hotline" and the "Science Fair." It is, however, doubtful that these are the type of "joint programs" contemplated in *Duncan*. In any event, any support this factor might lend to defendants'

position is clearly outweighed by the other factors, particularly the lack of any financial interest in the Shelby County schools on the part of Memphis residents, and the likelihood of overwhelming non-resident control of the Shelby County Board of Education if Memphis residents were to be included in the electorate.

IV.

Because the district court properly concluded that the Constitution prevents the State of Tennessee from including Memphis voters in the electorate for the Shelby County Board of Education under the circumstances of this case, the judgment of the district court is **affirmed.**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

COUNTY OF SHELBY, et al.,	)	
Plaintiffs,	)	
SHELBY COUNTY BOARD OF EDUCATION, et al.,	)	NO. 96-2491-TUA
Intervening Plaintiffs,	)	
HERMAN COX, et al.,	)	
Intervening Plaintiffs,	)	
VS.	)	
CHARLES W. BURSON, et al.,	)	
Defendants.	)	

ORDER ON MOTIONS AND CROSS-MOTION
FOR SUMMARY JUDGMENT

This case arises out of the passage of the Education Improvement Act of 1992 ("EIA" or "Act"), Tenn. Code Ann. § 49-2-101 *et seq.*, and specifically that portion of the Act mandating the popular election of county school boards. For the reasons discussed below, the court holds that the statute, as applied here, violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

I. BACKGROUND

The evidence before the court consists of affidavits and stipulated facts. Where facts are disputed, the court will believe the non-movants' evidence and draw all justifiable inferences in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *accord Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Based upon the entire record, however, the court determines that there are no genuine issues of material fact and that plaintiffs are entitled to judgment as a matter of law.

Shelby County, Tennessee encompasses two separate and distinct public school districts, the Memphis City Schools and the Shelby County School District. The Memphis City Schools, which provide elementary and secondary education to students residing in the City of Memphis, is the only special school district operating within Shelby County. The Shelby County School District provides elementary and secondary education to students residing in Shelby County but outside the corporate limits of Memphis. Under the current law, Shelby County Board of Education members are appointed by the Board of County Commissioners of Shelby County ("Board of County Commissioners"). *See* 1923 Tenn. Priv. Acts 381, as amended.

A large majority of Shelby County residents lives in Memphis. According to the 1990 census, Shelby County has a population of 826,330, of which 618,289, or 74.82%, reside in the city. As of May 1, 1996, there were 512,245 registered voters in Shelby County of which 365,240, or 71.2% reside in Memphis.

The Tennessee Constitution requires county school board members either to be appointed by the county board of commissioners or to be elected "by the people." Tenn. Const. Article XI, § 17. The Tennessee Supreme Court has held that, where the board members are to be elected, the state constitution "contemplates the election by all the qualified voters of the county, not [just] those residing beyond the corporate limits of a municipality." *Southern v. Beeler,* 195 S.W.2d 857, 865 (Tenn. 1946). The Chancery Court of Tennessee for the Thirtieth Judicial District at Memphis reaffirmed this rule in 1970 when it enjoined implementation of a private act which sought to enable the popular election of Shelby County Board of Education members by those county voters residing outside Memphis. *See Barnes v. Shelby County Election Comm'n,* No. 73609-3 R.D. (Shelby Cty. Chancery Ct. July 29, 1970).

In 1992, Tennessee passed the Education Improvement Act. Section 201(a)(1) of the Act mandates the popular election of all county and special school boards by September 1, 1996. Specifically, it provides that, "[n]otwithstanding any other law to the contrary, there shall be a board of education elected by the people." Tenn. Code Ann. § 49-2-201(a)(1). In response to the Act, on May 2, 1996, the Board of County Commissioners approved a seven single member district plan ("Plan C") calling for the popular election of Shelby County Board of Education members. That election was scheduled for August 1, 1996. As mandated by *Beeler,* the seven districts cover all of Shelby County, including Memphis.

Under Plan C, Memphis residents would form a significant voting majority in five of the seven voting districts, and a slim majority in a sixth.[1] Moreover, one of those majority districts is entirely within the Memphis city limits.

The Board of County Commissioners also adopted an alternative plan ("Plan A") to be implemented in the event Plan C was held to violate state and federal law in light of the principles enunciated in *Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995), discussed below. Plan A calls for the election of board members solely by voters residing in the area served by the Shelby County School District (i.e., by Shelby County residents who do not reside in Memphis).

On May 3, 1996, Shelby County and the Board of County Commissioners (collectively "plaintiffs") filed the complaint in the instant action, seeking declaratory and injunctive relief. Plaintiffs claim that implementation of Plan C would unfairly dilute the votes of those residents served by the Shelby County School District in violation of the one-person, one-vote principle embodied in the

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[1] The percentage of Memphis residents and the percentage of Memphis registered voters in the seven districts is as follows:

	Memphis Residents	Memphis Registered Voters
District 1	71.6%	70.3%
District 2	92.2	93.3
District 3	88.6	88.7
District 4	71.5	68.3
District 5	62.9	53.1
District 6	100.0	100.0
District 7	33.1	31.1

Equal Protection Clause of the Fourteenth Amendment.[2] They further allege that, under any plan that comports with both Tenn. Code Ann. § 49-2-201(a)(1) and Article XI, § 17 of the Tennessee Constitution, the voting strength of Memphis residents will so overwhelm that of voters residing outside the city "that it leaves residents served by the Shelby County school district with little or no chance to control their own school board." Compl. ¶ 29.

On May 10, 1996, various mayors of cities served by the Shelby County School District ("Mayors") filed an intervening complaint. In addition to reiterating plaintiffs' allegations, the Mayors assert a state law claim that Plan C violates Tenn. Code Ann. § 49-2-201(c), which provides, in essence, that Shelby County school board members must reside within the Shelby County school district.[3] The Mayors contend that this creates an illogical situation in which the voters and candidates of Plan C's District 6, which is wholly circumscribed by the City of Memphis, reside in mutually exclusive areas. On May 15,

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[2] The members of the Shelby County Board of Commissioners were initially unable to pass a plan for the election of the Board of Education by the required three-quarters vote. A compromise eventually evolved by which Plan C was adopted with a provision to challenge its validity under the Fourteenth Amendment.

[3] Tenn. Code Ann. § 49-2-201(c) states:

> Only persons who are residents of the area served by a local education agency are eligible to serve on the school board in counties with populations of seven hundred thousand (700,000) or more according to the 1990 census or any subsequent federal census.

1996, the Shelby County Board of Education and its individual members filed an intervening complaint, asserting the same claims as the Mayors. Also that day, the parties entered into a consent preliminary injunction enjoining defendants (the "State") from proceeding with the August 1, 1996, election of the Shelby County Board of Education. On May 23, 1996, the State filed its answer to plaintiffs' complaint. The State claims that enfranchisement of the Shelby County residents who live in Memphis is rational, and therefore constitutional, because Memphis residents have a substantial interest in the operation and quality of the Shelby County schools.

In a related case, on June 3, 1996, the Tennessee Court of Appeals upheld certain provisions of the Act, as applied to Shelby County, against various state law challenges. *County of Shelby v. McWherter,* C.A. No. 02A01-9601-CH-00015 (Tenn. Ct. App. June 3, 1996), *application for permission to appeal filed,* ___ (Tenn. Aug. 1996).

Plaintiffs and the Mayors, respectively, now move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Shelby County School Board and its members join in plaintiffs' motion. The State cross-moves for summary judgment pursuant to *Fed. R. Civ. P.* 56. The State also moves to certify two state law questions to the Tennessee Supreme Court. The City of Memphis and its Mayor, W.W. Herenton, have filed an amicus curiae brief in support of county-wide enfranchisement.

II. SUMMARY JUDGMENT STANDARD

The moving party is entitled to summary judgment where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. *Fed. R. Civ. P.* 56(c). When considering a motion for summary judgment, the court's function is not to weigh the evidence or judge its truth; rather, the court must determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986). Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules . . . designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) (quoting *Fed. R. Civ. P.* 1). The substantive law governing the case will determine what issues of fact are material. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir. 1989).

A summary judgment movant "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.,* 799 F.2d 1128, 1133 (6th Cir. 1986). Once that burden is met, the non-moving party must set forth specific facts showing a genuine issue of triable fact. *Fed. R. Civ. P.* 56(e). To meet this burden, the non-movant must do more than present some evidence that there is a disputed issue. Rather, the non-movant must present sufficient admissible evidence upon which a jury could return a verdict favorable to the non-moving party. *Anderson,* 477 U.S. at 249-50. Where a disputed issue of material fact is presented by countervailing

admissible evidence, the non-movant's version of such fact is presumed correct. *Eastman Kodak Co. v. Image Technical Serv., Inc.*, 112 S. Ct. 2072, 2077 (1992).

III. THE FOURTEENTH AMENDMENT'S ONE-PERSON, ONE-VOTE PRINCIPLE

A fundamental principle embodied in the Equal Protection Clause of the Fourteenth Amendment is that each citizen's vote is co-equal with that of his or her fellow citizen. This principle is well grounded in the precept that access to the franchise is a necessary precondition to unfettered participation in our system of democracy. As the Supreme Court has stated, per Chief Justice Warren:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). This strict scrutiny analysis necessarily constrains states' ability to impair or limit access to the franchise. In addition, amendments to the Constitution specifically forbid states from imposing certain voting requirements, such as race, sex, age above eighteen years or the payment of a poll tax.[4]

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[4] The Fifteenth Amendment prohibits the states from denying a citizen the right to vote "on account of race, color, or

A corollary to the fundamental right to vote is that the right must be apportioned equally to all members of the electorate. "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing – one person, one-vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1963). Moreover, it is beyond peradventure that the right can be impaired by means other than an outright prohibition on its exercise. Equally sinister is when a state dilutes the value of a citizen's vote by improperly expanding the voting base for a particular election. *See Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *Avery v. Midland County*, 390 U.S. 474 (1968) (prohibiting election of local government officials from single member voting districts of substantially unequal populations).

Recognizing that the right to vote is fundamental and must be apportioned equally, however, may beg the more pressing question of how far, geographically, the Constitution requires or permits the state to extend the franchise. In *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), the Court held that a municipality may properly deny residents of an outlying unincorporated area the

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previous condition of servitude," the Nineteenth Amendment prohibits discrimination in voting on account of sex, the Twenty-fourth Amendment proscribes the use of a poll tax in elections for a candidate for federal office, and the Twenty-sixth Amendment grants the right to vote to all citizens age eighteen years or older.

right to vote in local elections, even though the municipality provided essential services to the outlying residents. The Court's analysis focused primarily on the municipality's geographic boundary:

> No decision of this Court has extended the "one man, one vote" principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the State or its political subdivisions. On the contrary, our cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.

Id. at 68-69. Of course, residency remains an important and often dispositive factor in establishing the right to the franchise. *See, e.g., Dunn v. Blumstein,* 405 U.S. 330 (1972) (striking down Tennessee's durational residency requirement for voter eligibility as unconstitutionally excessive); *Carrington v. Rash,* 380 U.S. 89 (1965) (declaring unconstitutional Texas statute preventing members of armed forces who moved to Texas from voting in state elections).

In addition to the geographical limitations on the right of suffrage, there are circumstances in which a state or subdivision may restrict the franchise to citizens who have a "special interest" in a particular election. Indeed, "[b]ona fide residence alone . . . does not automatically confer the right to vote on all matters, for at least in the context of special interest elections the State may constitutionally disfranchise residents who lack the required special interest in the subject matter of the election." *Holt,* 439 U.S. at 69.

The Court first recognized the possible validity of special interest elections in *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969). In *Kramer,* the Court faced a challenge to New York State law that required residents either to have children enrolled in a district school or to own or lease taxable property in order to vote in school district elections. The appellant, a childless stockbroker who did not own or lease such property, contended that the school board's decisions would affect him and, therefore, that denying him the right to vote violated the Equal Protection Clause. The state defended the law on the basis that it ensured a better informed electorate.

The Court applied a strict scrutiny analysis, requiring that the statute be "necessary to promote a compelling state interest." *Id.* at 630. The Court first assumed, *arguendo,* that the state "legitimately might limit the franchise in these school district elections to those 'primarily interested in school affairs.' " *Id.* at 632. However, the Court held that the statute's classifications did not "accomplish this purpose with sufficient precision to justify denying appellant the franchise," in that it included persons with only a remote interest in school affairs while excluding others who had "a distinct and direct interest in the school meeting decisions." *Id.* Although it struck down the law, the Court has since upheld statutes which have more precisely limited the franchise to voters especially affected by an election. *See, e.g., Associated Enters., Inc. v. Toltec Watershed Improvement Dist.,* 410 U.S. 743 (1973) (upholding statute which restricted franchise in water storage district elections to landowners and apportioned vote based on land ownership); *Salyer Land Co. v.*

Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (same); *Ball v. James*, 451 U.S. 355 (1981) (upholding similar statute where water conservation district also empowered to issue bonds because district did not possess general taxing power).

The Sixth Circuit, controlling authority in this district, recently reviewed these cases and distilled the following general rules:

> First, there is a well-grounded presumption in favor of the franchise. Second, vote dilution is as nefarious as an outright prohibition on voting. Finally, where a voter can show that he lives in the relevant political jurisdiction, the presumption of enfranchisement is particularly powerful, though not dispositive. Proof of residence (assuming compliance with other normal voting requirements) in many ways operates to place an onerous burden on the government to demonstrate that the topic of the election is sufficiently unique or distinctive that it can forego a universal franchise.

Duncan v. Coffee County, 69 F.3d 88, 92-93 (6th Cir. 1995).

IV. DUNCAN V. COFFEE COUNTY

In *Duncan*, the case most directly applicable to the instant action, the Sixth Circuit addressed Tennessee's EIA as it applied to elections for the Coffee County, Tennessee School Board. Coffee County has three separate school districts operating within its borders. The Rural Coffee County School District provides schooling from kindergarten through twelfth grade for residents living outside the geographic limits of the cities of

Tullahoma and Manchester. The school district for the City of Tullahoma provides elementary and secondary education to its residents. Students in Manchester attend schools in that city from kindergarten through ninth grade, at which point they attend the Rural Coffee County school system. In response to the EIA, Coffee County reapportioned its school board. As a result, Tullahoma, which previously held only one seat on the board, now held two seats outright, and two seats were mixed between Tullahoma and Rural Coffee County. Residents of Rural Coffee County brought suit, claiming that the reapportionment unfairly diluted their votes.

The court first rejected the state's argument that the Act mandated the inclusion of Tullahoma residents simply because they lived in the geographic confines of Coffee County. Citing *Dunn* and *Holt, supra,* the court held that the relevant "jurisdiction" for purposes of the school board elections was the Rural Coffee County School District. "Therefore, because Tullahoma residents do not live in the relevant geopolitical entity called the Rural Coffee County School District, the state need not prove a compelling state interest to exclude them." *Duncan,* 69 F.3d at 94.

Although the court held that inclusion was not mandatory, it recognized that Tennessee and Coffee County may extend the franchise to Tullahoma residents "as an exercise of normal public policy making . . . so long as they do not unconstitutionally dilute the votes of Rural Coffee County residents." *Id.* The court then adopted the following test, originally stated by the Fifth Circuit and developed by its successor, the Eleventh Circuit:

> [T]he benchmark for determining whether the inclusion of "out-of-district" voters in another district's elections unconstitutionally dilutes those votes is whether the decision is irrational. A decision to include "out-of-district" voters in the election is not irrational if Coffee County can show that those voters have a substantial interest in the Rural Coffee County School District election.

Id.; see also Sutton v. Escambia County Bd. of Educ., 809 F.2d 770 (11th Cir. 1987). To determine whether the out-of-district voters had a substantial interest in the election, the court looked at the following four factors:

> (1) The degree to which one district is financing the other;
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> (2) The voting strength of the non-resident voters;
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> (3) The number of, or potential for, cross-over students;
>
> (4) The existence of any joint programs.

Duncan, 69 F.3d at 96.

Applying these factors, the Sixth Circuit concluded that it was rational to allow Tullahoma residents to vote in the Coffee County School Board elections. The court relied heavily on the fact that Tullahoma provided a substantial amount of its sales and property taxes to support the rural school district and that the limited voting strength of the Tullahoma residents gave them "only the most minuscule mathematical chance to control the Coffee County School Board." *Id.* at 98.

V. THE ENFRANCHISEMENT OF MEMPHIS VOTERS IN THE SHELBY COUNTY BOARD OF EDUCATION ELECTIONS

A. Whether Duncan v. Coffee County Applies

The State's first argument in support of enfranchising Memphis residents is that the EIA, as applied to Shelby County, will not dilute the vote of Shelby County residents living outside the city. Under the system currently in place, school board members are appointed by the Board of County Commissioners, who, in turn, are elected by the entire county. Because the EIA simply mandates a change in selecting school board members from an indirect election to a direct election, the State contends, it is not a reapportionment statute as applied to Shelby County and, therefore, *Duncan* is inapplicable.

Although the State's argument appears to have some initial appeal, ultimately it lacks merit. First, the Supreme Court has consistently distinguished between cases in which elected officials appoint government officers and those in which the same officers are elected directly by the people. In the latter cases, statutes affecting the franchise are given more exacting scrutiny. Thus, in *Gray v. Sanders*, 372 U.S. 368 (1963), the Court struck down on equal protection grounds a Georgia statute which gave greater weight to the voters of smaller counties in the election of state officials. Three years later, however, it upheld a law allowing members of the Georgia General Assembly to elect the governor if no candidate initially received a majority in the state-wide election, even though the weight of each citizen's vote in the ultimate selection of the governor would necessarily be different

under that system. *Fortson v. Morris*, 385 U.S. 231 (1966). The *Fortson* Court explained that *Gray*

> was "only a voting case." Not a word in the Court's opinion indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly.

Id. at 233 (quoting *Gray*, 372 U.S. at 378). These cases, taken together, stand for the proposition that, "[i]f there is no popular election, the one person, one vote rule does not apply." 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance and Procedure*, § 18.36(1) at 442 (2d ed. 1992).

Similarly, in *Sailors v. Board of Education*, 387 U.S. 105 (1967), the Court upheld a system whereby each local school board had an equal vote in the selection of county school board members, even though the districts represented by the local boards differed in population. "Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative office, [sic] the principle of 'one man, one vote' has no relevancy." *Id.* at 111.

The upshot of these cases is that the prior method of appointing school board members likely did not violate the one-person, one-vote principle. Nevertheless, that is a question not currently before the court. The existence *vel non* of a constitutional infirmity in the prior system is of no moment; the court is presented with a new statute whose validity is to be examined in accordance with the most recent governing case law. *See Kramer*, 395 U.S. at

628-29 ("The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment."). Accordingly, *Duncan* applies here.[5]

B. Application of the Duncan v. Coffee County Factors

The court now turns to the application of the four *Duncan* factors.

1. The degree to which one district is financing the other

The Sixth Circuit in *Duncan* held that:

> where . . . a city provides a substantial amount of its own sales and property taxes to a neighboring school district, and where those funds make up a sizable portion of the recipient's budget, the decision to make the city residents eligible to vote in the county school board elections

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[5] Intertwined with the State's contention that *Duncan* is inapplicable is an attempt to define the relevant jurisdiction as the entirety of Shelby County. By so doing, the State argues that the exclusion of Memphis voters would be tantamount to holding a "special interest" election in which only county school district residents would be qualified to vote, a restriction defensible only by the showing of a compelling State interest. This argument is clearly foreclosed by the Sixth Circuit's holding that "the proper definition of the appropriate jurisdiction is the [area served by the local school board]." *Duncan*, 69 F.3d at 93.

> is supported by a substantial interest and is therefore not wholly irrational.

Duncan, 69 F.3d at 97. The court found that Tullahoma's contribution to the Rural Coffee County School District accounted for 7.28% of that district's budget from all sources, local, state and federal. *Id.* at 96. "More importantly, when compared to the apparent total local revenues used by the Rural Coffee County School District . . . , Tullahoma accounts for 21% of all local funds spent by the Rural Coffee County School District." *Id.* at 96-97. Thus, the city had a substantial interest in the county school board elections.

a. The "net flow" analysis

The parties here dispute the degree to which the city district and the county district are financially interrelated. As a preliminary matter, the State contends that plaintiffs incorrectly read *Duncan* to endorse a "net flow" analysis of the financial data. The net flow analysis examines the tax collections and expenditures of each district, as those figures relate to school financing, to determine which district supports the others' schools. In other words, if a district collects more in taxes allocated to schools than it spends, and the other district spends an equivalent amount more on schools than it collects, it can be inferred that the first district finances the second to that extent. The State argues, on the other hand, that the relevant figure is the percentage of the total budget of the Shelby County school system that is generated directly from taxes generated in Memphis, without consideration

of how much money flows back into the city. This court disagrees.

In *Duncan*, the court compared the property and sales taxes collected in each area served by the three school districts to each district's expenditures. *Duncan*, 69 F.3d at 91. Based on this comparison, it concluded that Tullahoma and Manchester spent less on its school system than it collected in school taxes. *Id.* It also concluded that the Rural Coffee County school system's budget exceeded the taxes collected in Rural Coffee County in an amount essentially equal to the excess funds generated in Tullahoma and Manchester. *Id.* ("Rural Coffee County collects $1,908,466, but the Rural Coffee County School District, *because of the transfers of money from city residents*, spends $2,612,898 in local tax dollars.") (emphasis added). Clearly, the Sixth Circuit in *Duncan* performed a net flow analysis. Furthermore, the State's position would lead to the illogical conclusion that Memphis residents finance the Shelby County School District no matter how much excess county district money flows the other way. Therefore, the net flow analysis is the proper method of determining the degree to which one district finances the other.

b. The relevant time period

The State next argues that, even assuming the net flow analysis applies, the court should not rely solely on data from a single fiscal year. The court agrees. Tennessee is not required to defend its decision to expand the franchise based on a single year or a set of conditions present at a particular time. The linchpin of the relevant inquiry

is whether the city has a substantial interest in the affairs of the Shelby County School Board; that determination must be based upon an examination of the totality of the circumstances.[6] Consequently, the State is entitled to support its decision by offering proof of financing in more than one fiscal year, so long as the proof comports with the general rules of relevance.

c. The financial evidence submitted

The evidence indicates that there is no material dispute as to the question of financing and that, on a net flow basis, the residents of the Shelby County School District finance the Memphis City Schools. The EIA replaced the prior system of school funding with the Basic Education Program ("BEP"). The BEP establishes a state-wide educational funding system by creating an economic partnership between the State and its counties. The BEP, through a complex series of educational components and mathematical calculations, requires each county to contribute a certain percentage of the State's share of the educational burden. This is the county's "fiscal capacity." Unfortunately, the parties agree that, "[f]or a variety of reasons fiscal capacity cannot reliably be calculated for each school system when there are multiple systems in a county." Stipulation of Facts ¶ 14. Thus, the fiscal capacities allocated separately to the Memphis

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[6] For example, it would be incongruous to suggest that, had Memphis financed Shelby County schools in a substantial amount in 1992-93 and in 1993-94, but that in 1994-95 Shelby County minimally financed city schools, this factor would weigh in favor of disenfranchising city voters.

City Schools and the Shelby County School District are unknown.

Nevertheless, the parties have provided sufficient evidence of each jurisdiction's total property and sales tax revenues and school board expenditures for the court to apply the first *Duncan* factor. Indeed, the Sixth Circuit in *Duncan* simply added up and compared each jurisdiction's taxes and expenditures allocated to schools to determine that Tullahoma contributed substantially more to the Rural Coffee County school system than it received from the county. The court did not delve into the complexities of the fiscal capacity data, and thus did not appear to consider the absence of reliable intra-county fiscal capacity data a stumbling block in its financial analysis.

The parties here have waged a battle of affidavits regarding the exact financial information. The evidence submitted, however, does not present any material disputes and, viewed in the light most favorable to the nonmovants, supports plaintiffs' position that enfranchisement of city voters is irrational.

Plaintiffs rely on the affidavit of Bob Patterson, Trustee of Shelby County. He avers that the total amount of property tax revenues designated for education from all of Shelby County in the fiscal year 1994-95 was $125,215,344. Patterson Aff. ¶ 4. Of that, Memphis residents paid $81,828,227 in property taxes. Patterson Aff. ¶ 5. However, the Memphis City Schools received more in return; they were allocated $88,687,780 from property tax revenues. *Id.* By contrast, residents of the area served by the Shelby County School District paid $43,387,117 in

property taxes allocated to schools, and yet its school system received only $36,527,564 from property tax revenues. Patterson Aff. ¶ 6. Thus, of the property taxes collected within the Shelby County School District in 1994-95, $6,859,553 went to support the Memphis City Schools. Patterson Aff. ¶ 14.

A local option sales tax also supports education in Shelby County.[7] Patterson's sales tax figures are derived and calculated based on the "point of sale," i.e., within or outside the county school district. Patterson Aff. ¶ 7. Of the sales taxes collected in Shelby County, half are allocated to local government and the other half to schools, except that all of the sales taxes collected in the unincorporated areas of Shelby County are designated for schools. Patterson Aff. ¶ 9. Sales tax revenues are divided between the two school districts based on a weighted full time equivalent average daily attendance ratio. Patterson Aff. ¶ 10.

In terms of absolute dollars, sales taxes collected in Memphis in 1994-95 and allocated to schools totalled $76,847,701. Patterson Aff. ¶ 11. However, the Memphis

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[7] There are other taxes collected in Shelby County, such as the wheel tax, the litigation tax and the hotel/motel tax. Patterson Aff. ¶ 13. None of the revenue generated by those taxes, however, is allocated to the operation of school districts. *Id.* The parties have stipulated that a portion of the revenues generated by the wheel tax is used to retire public education debts, Stipulation of Facts ¶ 27, although no further breakdown of how the tax is allocated or used has been provided and, therefore, the court does not rely on the wheel tax in the net flow analysis.

City Schools received only $73,549,674 in sales tax revenue. *Id.* Conversely, sales taxes collected outside the city and allocated to schools totalled $27,036,020, but the Shelby County School District received $30,334,047 in sales tax revenues. *Id.* Thus, Memphis sent $3,298,027 in sales tax revenues to the Shelby County School District. Patterson Aff. ¶ 15.

Plaintiffs' evidence as to all applicable taxes demonstrates that, on a net flow basis, Shelby County School District residents sent approximately $3,561,526 to the Memphis City Schools in the fiscal year 1994-95. Patterson Aff. ¶ 16. That figure is derived by subtracting the sales tax support that Memphis provided to the Shelby County School District from the property tax support residents of that district provided to the Memphis City Schools.

The State rebuts these figures through the affidavit of Lynne Holiday.[8] Holliday is a Senior Research Associate

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[8] The State also submits the affidavit of Jim Jones, Director of Local Finance for the Tennessee Department of Education. Jones avers that Patterson's raw data does not comport with figures in documents filed with the Tennessee Department of Education by the Shelby County Board of Education and the Memphis Board of Education. Jones Aff. ¶ 3. Some of the discrepancies Jones notes are significant; however, Jones does not aver which figures are correct, and the State does not cite those differences in its papers. Moreover, Jones' numbers also differ from Holliday's, upon which the State does rely.

On August 8, 1996, the court initiated a conference call with all parties to clarify whether the State indeed was relying on Jones' affidavit and the financial information contained therein. During that call, counsel for the State represented that Jones' figures are derived from the 1994-95 budgets for each school

at the Tennessee Advisory Commission on Intergovernmental Relations who worked for two years on the BEP funding formula while at the Tennessee Department of Education. Holliday Aff. ¶ 1. She reviewed plaintiffs' calculations of collections and disbursements of property and sales tax figures that were attached to their complaint and avers that "the figures in the Exhibit did not match the figures reported by Shelby County to the State." Holliday Aff. ¶ 2. Further, Holliday states that plaintiffs not only used incorrect raw numbers, but that the methodology used to calculate net flow was not appropriate given the issues raised here. Holliday Aff. ¶ 3. Accordingly, she performed her own calculations based on the State's figures for the previous three fiscal years. *Id.*

Despite Holliday's ascription of errors to plaintiffs' raw data and methodology, however, her own results are not materially different. For the fiscal year 1994-95, she determined that the amount of excess property taxes generated within the Shelby County School District was $4,761,225, and that the amount of excess sales taxes generated in Memphis was $3,507,457, resulting in a net flow of $1,253,767 to the Memphis City Schools.[9] Holliday

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system, and thus were supplanted by the actual data now available. Accordingly, the State asserted that it was not relying on his affidavit in their cross-motion for summary judgment or in their response to plaintiffs' motion, and that the court should "disregard" it. Accordingly, the court looks to Holliday's affidavit to support the State's contentions regarding the financing issue.

[9] For purposes of mathematical clarity, the court acknowledges a one dollar discrepancy in these figures.

Aff. Ex. A at 7-9. For the fiscal year 1993-94, her calculations indicate a net flow of $2,220,355 from the area served by the Shelby County School District to the Memphis City Schools. Holliday Aff. Ex. A at 4-6. Thus, she admits that "I do show a positive net flow [into Memphis] for 1994-95 and also 1993-94." Holliday Aff. ¶ 4. Moreover, in the conference call of August 6, 1996, *see supra* n.8, the State conceded that the Shelby County School District financed the Memphis City Schools in 1994-95 and in 1993-94. For the fiscal year 1992-93, however, Holliday calculated a net flow out of Memphis in the amount of $310,826, Holliday Aff. Ex. A at 3, and plaintiffs have not offered any evidence in rebuttal.

Consequently, it is undisputed that in the fiscal years 1994-95 and 1993-94, residents of the areas served by the Shelby County School District supported the Memphis City Schools with at least $1,253,767 and $2,220,355, respectively. It is also undisputed that in the fiscal year 1992-93, Memphis sent $310,826 to the Shelby County School District.

In its response to plaintiffs' motion for summary judgment, the State challenges the significance of the county district residents' overall support provided to the Memphis City Schools. Using the data from 1994-95, the State argues that:

> Plaintiffs' "net flow" of $3,561,526 from Shelby County taxpayers to the Memphis School System for 1994-95 is an insignificant sum compared to the total budgets for the school systems. It represents 1.94% of the total revenues of $183,330,030 for the Shelby County System, and 0.66% of the total revenues for the

> Memphis City System. (Affidavit of Jim Jones, 1994-95 Annual Public School Financial Reports for Shelby County and Memphis).

Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Defs.' Cross-Mot. for Summ. J. at 13. However, this misconstrues the relevance of the first *Duncan* factor. That factor attempts to divine the interest of Memphis residents in county school affairs, not the other way around. The degree to which Shelby County School District residents support schools in Memphis is of little relevance. The simple fact is that the financial information for the last two fiscal years does not establish that city voters have a substantial interest in the election.[10]

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[10] The State has not argued that this court should look at the property tax and sales tax figures separately, although that issue merits comment here. Using that approach, sales tax revenues generated in Memphis have helped to support Shelby County schools for the past three fiscal years. However, the evidence does not indicate how much of that sales tax was paid by county residents shopping in Memphis. In *Phillips v. Andress*, 634 F.2d 947, 951 (5th Cir. Unit B. Jan. 1981), the Fifth Circuit commented upon that very situation in reversing the district court's finding that enfranchisement of city voters in the outlying school district was constitutionally permissible:

> [T]he generation of sales tax revenues, which the lower court found to be "the principal source of local tax support" for the county system, are not conditioned upon the residence or "citizenship" of the purchasers, but depend instead upon the place of purchase. Although the district court was no doubt correct in inferring that a substantial majority of the county's sales tax revenues are generated in the city, the record fails to disclose how much of this revenue is attributable to purchases made by county residents shopping in the city. In light of the small proportion

The State next argues that Memphis residents have a substantial interest in the election because Memphis sent $310,826 to the Shelby County School District in the fiscal year 1992-93. This argument is unpersuasive. Although the State has not submitted the 1992-93 budget for the Shelby County school system, financial data in Holliday's affidavit indicates that the $310,826 is insignificant. In *Duncan,* the court relied heavily on the percentage of city dollars that financed the county schools based on the "apparent total local revenues used by the [county school district]." *Duncan,* 69 F.3d at 96. Total local revenues (as opposed to revenues from state and federal sources) were calculated by adding together those portions of the local sales and property taxes collected throughout the county and spent by the Rural Coffee County School District. The court found that city support in the amount of 21% was substantial. *Id.* at 96-97.

Here, Holliday avers that the property tax revenues distributed to Shelby County schools in 1992-93 was $31,137,849, and sales tax revenues $24,568,907. Holliday Aff. Ex. A at 1-2. This totals $55,706,756 in apparent local

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> that the county system's share of the countywide sales tax bears to its operating budget ($488,000 out of an overall budget in excess of $11 million), we cannot conclude that this degree of financial support is sufficient to confer a voter's interest on the city resident. *Particularly this is so when "interest" is premised on the source of the funds and yet no effort has been made to distinguish between county residents' and city residents' share of sales tax revenues generated in the city.*

(Emphasis added). Accordingly, the court gives less weight to the sales tax figures taken by themselves.

tax revenues, of which the $310,826 attributed to Memphis represents only 0.56%. This is an insignificant number, and nowhere near the percentages found to confer a substantial city interest in *Duncan*. Moreover, any potential relevance of this subsidy is diminished because, in the following two years, county residents made much greater contributions to the Memphis City Schools.[11]

Other courts in similar cases have held that, where a city provides only limited economic support to another district's school system, this factor weighs against enfranchising city residents. *See, e.g., Hogencamp v. Lee County Bd. of Educ.*, 722 F.2d 720, 722 (11th Cir. 1984) (holding that 2.74% of county school system budget attributable to city dollars was "insufficient by itself to create a substantial interest in the city residents"); *Phillips v. Andress*, 634 F.2d 947, 951 (5th Cir. Unit B Jan. 1981) (holding that property tax revenue provision of $90,000 from city to county schools, which represented less than 1% of county school system budget, was insignificant, even when combined with sales tax revenue flowing out of city); *cf. Hosford v. Ray*, 806 F. Supp. 1297, 1306 (S.D. Miss. 1992) (finding that there was no "financial interlock between the city and county school systems here which would support a finding that [city electors] have a substantial interest in the [county school district]."). Accordingly, based on the undisputed evidence, the court holds that

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[11] Indeed, the State argues in its previous paragraph that the county's support of city schools in 1994-95 of $3,561,526 was "insignificant," albeit based on a comparison to total city school revenues.

the first *Duncan* factor strongly supports plaintiffs' position that enfranchisement of Memphis voters is irrational.

2. The voting strength of the non-resident voters

The Sixth Circuit stated in *Duncan* that:

> Where the government allocates the franchise in such a manner that residents of a separate area have little or no chance to control their own school board, there may be grave constitutional concerns, even where out-of-district voters have a substantial interest.

Duncan, 69 F.3d at 97. Under the reapportionment plan at issue there, two of the seven seats on the school board were within the City of Tullahoma, and two others were mixed between Tullahoma and Rural Coffee County. *Id.* at 91. Accordingly, the constitutional concerns were minimized because "there is only the slimmest possibility that Tullahoma residents can control the Coffee County School Board, and then only if Rural Coffee County residents allow them to." *Id.* at 97. The opposite is true here.

More than 70% of the overall and voting-age populations of Shelby County reside in Memphis. Of the seven single member voting districts established by Plan C, Memphis registered voters would hold a strong majority in five districts and a slim majority in the sixth. Moreover, one of those five strong majority districts is entirely within Memphis. Residents of the area served by the county school board, therefore, will likely control only one district. Whereas under the current system only one

Shelby County Board of Education member lives in Memphis, under Plan C it is not only possible, but almost a given, that out-of-district residents will exercise overwhelming majority control on the board.[12]

Other courts in similar cases have found in favor of disenfranchising city residents even when those residents possessed significantly less voting power than is present here. *See, e.g., Hogencamp,* 722 F.2d at 721 (city voters had decided three of five previous elections for school board); *Phillips,* 634 F.2d at 948 (city population was 56% of total county population); *Hosford,* 806 F. Supp. at 1306-07 (where city residents cast 37% of votes, court held that this factor "argues in favor of excluding [city] voters under . . . equal protection analysis"). Where courts have held in favor of enfranchisement, the city voters invariably had a lesser influence at the ballot box than Memphis residents would have if Plan C were to be implemented. *See, e.g., Davis v. Linville,* 864 F.2d 127, 129 (11th Cir. 1989) (although city residents allowed to vote for county superintendent of education, elected superintendent had been preferred candidate of non-city voters in four of five previous elections); *Sutton,* 809 F.2d 770, 773-774 (11th

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[12] The State's argument that *Thornburgh v. Gingles,* 478 U.S. 30, 50-51 (1986), requires plaintiffs to demonstrate the existence of racial bloc voting in order to establish a claim of vote dilution is inapposite. *Gingles* is a Voting Rights Act case and is, therefore, inapplicable here. Moreover, that case did not involve the extension of the franchise to disinterested voters, but rather the creation of multimember voting districts in an alleged attempt to dilute the vote of black citizens. More importantly, unlike the residents of Memphis in this action, the white majority in *Gingles* lived within the geographic confines of the relevant jurisdiction.

Cir. 1987) (only 17% of county population lived in city, city residents did not dominate county school elections, percentage of city voters never constituted more than 26% of relevant electorate and, since 1958, no election had been decided by city voters); *Creel v. Freeman*, 531 F.2d 286, 287 (5th Cir. 1976) (less than one-third of county voters lived in either of two cities not served by school board, cities' voters did not dominate county-wide elections and no incumbent school board member lived in either city).

The State contends that, despite their population dominance, out-of-district residents have the same interest in the quality of education in the Shelby County School District as do residents of that district because graduates of the county school system often find work in Memphis. Although the court acknowledges that many county school graduates are undoubtedly ultimately employed in the city, this is an indirect benefit that cannot be said to confer upon Memphis residents a substantial interest in county school affairs. Were the court to hold otherwise, the second *Duncan* factor would be effectively neutered.[13] Certainly that is not the result the Sixth Circuit intended when it alluded to the "grave constitutional concerns" presented when out-of-district residents hold a substantial voting majority. *Duncan*, 69 F.3d at 97.[14]

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[13] By the same token, the State could claim an interest in the quality of education in Knox or Davidson Counties, or even in the State of New York, given that graduates of schools in those jurisdictions often find their way to Memphis.

[14] Of possible significance is that the *Duncan* court did not address this argument, even though the State also litigated that case.

Finally, the State contends that the Shelby County school system will benefit if Memphis residents vote for its board members. If Memphis residents are enfranchised, the State argues, they will vote more sympathetically to the Shelby County School District in county referenda seeking to raise funds for both districts' schools. This argument rings disingenuous. Memphis voters in such referenda certainly have their own interests to protect, regardless of their presence on the Shelby County Board of Education. Moreover, it can hardly be said that the Shelby County school system will benefit from the inclusion of a bloc of city voters so large as to render ineffective its own chosen representatives simply because those voters "will appreciate the needs of Shelby County schools if they have participated in electing the board." Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Defs.' Cross-Mot. for Summ. J. at 16. In conclusion, the voting strength of Memphis residents in the Shelby County Board of Education elections is a strong factor in plaintiffs' favor.

3. The number of, or potential for, crossover students

Because of a long-standing desegregation order still in effect in Shelby County, the potential for crossover students, i.e., students who reside in one district but attend school in the other district, is severely restricted. The order provides, in pertinent part:

> [N]o pupil will be allowed to attend a school outside the zone in which the pupil lives except for valid administrative or educational reasons and then only if the pupil is not by the transfer

> avoiding a school in which the pupil would be in a racial minority and attending a school in which the pupil would be in a racial majority.

Robinson v. Shelby County Bd. of Educ., No. 4916-H (W.D. Tenn. May 7, 1970) (quoting in Stipulation of Facts ¶ 35).

Two situations, however, provide for actual or potential student crossover. First, teachers in the Shelby County school system who began working for the system prior to 1981 may enroll their children in county schools, regardless of whether the teacher or child resides in the district. *See* Second Affidavit of James Anderson, Superintendent of Shelby County Schools ("Second Anderson Aff."), ¶ 4. In the 1995-96 school year, there were 106 students who attended county schools pursuant to this policy, or 0.23% of the 45,686 county students. *Id.* That number will necessarily decrease as the students graduate, *id.*, and, presumably, as the number of eligible teachers decreases.

The second situation involves high school students residing in the newly-annexed Cordova section of Memphis. Second Anderson Aff. ¶ 5. Those students attend a county high school because the Memphis City Schools have not yet built a school for that area. *Id.* In the 1995-96 school year, there were 271 of such students, or 0.59% of the total county student enrollment. *Id.* The parties stipulate that the county district will build and operate a high school in Cordova to relieve the problem. Stipulations of Fact ¶ 36. After seven years, the county district will turn over full ownership and operation of the school to the city district. *Id.* The parties estimate that, in the school

year 1997-98, crossover Cordova students will number 377, or 0.76% of all county students. *Id.*[15]

The parties have not alleged that there are other situations in which city students actually or potentially attend county schools. Moreover, the parties have not alleged that any county students attend city schools. However, the State asserts that:

> both school systems combine to provide services in Adult Basic Education, General Equivalency Diploma and English As A Second Language. These joint programs undoubtedly have cross-over students similar to the *Duncan* case.

Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Defs.' Cross-Mot. for Summ. J. at 16. Indeed, the court in *Duncan* acknowledged that 20% of all adult education students were Tullahoma residents. *Duncan*, 69 F.3d at 97. Regardless, the State does not offer any evidence of the number of crossover students under these programs, and therefore its assertion is given little weight.

In sum, the number of city students who attend county schools is less than 1% of the total county student population. The *Duncan* court stated that, where Tullahoma students accounted for 1% of the students in the Rural Coffee County School System, "[t]he number of crossover students in the normal student body is minimal." 69 F.3d at 97. Even when those students were combined with the adult education crossover students,

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[15] The stipulations state that the crossover students represent "0.076 percent of all county students," but this number is apparently off by one decimal place.

the court held that "this factor is not a strong point for either side." *Id.; see also Hogencamp*, 722 F.2d at 722 (reversing district court's finding of substantial interest despite fact that (1) city with independent school system sent 50-100 students to county school system and (2) students in newly-annexed portion of other city with independent system were allowed to remain in county school). Based on the undisputed evidence, this court holds that the third factor weighs slightly in plaintiffs' favor.

4. The existence of any joint programs

The State asserts that the Shelby County School District and the Memphis City Schools provide "funding, personnel and/or resources" for a number of "joint programs" between the two districts. Affidavit of Ralph Barnett, Regional Director, West Tennessee, for the Department of Education ("Barnett Aff.") ¶ 3. For example, the Memphis City Schools provide special educational services to county students where appropriate services are not available in the county system. Barnett Aff. ¶ 3(B). Shelby County pays tuition for these services. *Id.* Teachers from both systems participate in a "Homework Hotline," a volunteer service available to students in both districts, in an "Urban [S]ystematic Initiative," a joint secondary math project which aids students in both districts in math, and in a "Facing History Program." Barnett Aff. ¶ 3(C), (E), (G). Both districts jointly operate a "Homeless Education" project for homeless persons throughout the county, including Memphis, and provide visiting team members for evaluations by the Southern

Association of Colleges and Schools. Barnett Aff. ¶ 3(F), (I). Teachers and students from both systems also participate in the "Science Fair Program." Barnett Aff. ¶ 3(H). Finally, parent/teacher associations from both school districts participate in a joint training program for parents of students living throughout Shelby County. Barnett Aff. ¶ 3(K). The State further alleges that both districts, pursuant to the Cordova School agreement, contemplate future cooperation with respect to the capital requirements of both school systems.

Plaintiffs respond that these cooperative efforts do not constitute "joint programs" under *Duncan*. Instead, the efforts (1) concern joint participation in federally funded programs, (2) describe extra-curricular, volunteer programs in which teachers or parents join and participate, (3) describe programs in which many other school systems participate or (4) describe county students attending city schools, which, plaintiffs argue, is an irrelevant consideration. Pls.' Resp. to Defs.' Statement of Material Facts in Supp. of Cross Mot. for Summ. J. at ¶ 14.

The existence of some joint programs is not, by itself, sufficient to confer upon Memphis residents a substantial interest in county school board elections. In cases where the existence of joint programs has been held to favor city enfranchisement, courts have examined this factor as being closely related to the issue of crossover students, and have further found that the number of crossover students was significant. In *Sutton*, for example, the court acknowledged the extensive cooperative efforts to provide services, including transportation, to multi-handicapped and trainable mentally retarded students. 809 F.2d at 774. However, both the city and county school boards

had an open-door policy to student enrollment and the county operated a summer school session attended by city students. *Id.* As a result, there was a meaningful number of crossover students. *See id.; Davis,* 864 F.2d at 129-30 (existence of joint programs, in addition to considerable student crossover due to open-door policy, held to support finding of substantial interest). Moreover, the voting strength of the city residents in *Sutton* was substantially less (approximately 26%) than is present here. 809 F.2d at 774.

Furthermore, the significance of this factor is diminished because the State has not proffered any evidence regarding how many teachers or students participate in these programs, nor has it discussed how these programs are funded or administered. Accordingly, even accepting the State's evidence as true, this factor at best weighs only slightly in favor of the State.

C. Summary of Duncan Factors

As applied to the undisputed facts, the four *Duncan* factors demonstrate that Memphis residents do not have a substantial interest in the affairs of the Shelby County Board of Education and that Tennessee's decision to include them in the franchise is irrational. In particular, the city has at best only a slight financial interest in county schools because, on a net flow basis, its taxes for the past two fiscal years have not supported the Shelby County School District. In fact, it is the county residents who have supported the Memphis City Schools in those years. More importantly, the enfranchisement of city voters would almost certainly result in an overwhelming

city majority on the Shelby County Board of Education, effectively preventing county school district residents from controlling the manner in which their schools are administered. The insignificant number of crossover students and the existence of some joint programs is hardly enough to confer a substantial interest in county school affairs. Finally, even assuming that a substantial interest is found, that interest is certainly outweighed by the "grave constitutional concerns" implicated by the excessive vote dilution present here.

D. Consideration of Non-Duncan Factors

Lastly, the State urges the court to consider its interest in the uniform application of the educational governance reforms embodied in the EIA, and particularly in that portion of the statute mandating the popular election of county school boards. The court agrees that *Duncan* does not foreclose inquiry into other State interests in enfranchising city residents. The Sixth Circuit did not hold that the "substantial interest" test is the only means of establishing a rational basis for including out-of-district voters. The court, therefore, must give due consideration to the State's purported justifications for the statute. Nevertheless, the State's argument is unpersuasive.

To a large extent, the State merely attempts to reargue its claim that city residents hold a substantial interest in county affairs. Furthermore, the alleged interest in state-wide school board uniformity is far too broadly and vaguely presented to be given constitutional significance in light of the overwhelming vote dilution discussed earlier. There is no evidence in the record that the popular

election rule, as specifically applied to Shelby County, is necessary to protect other provisions of the EIA, such as its educational performance standards or its emphasis on greater local control of the educational system. The State's contention is also undermined by the fact that certain provisions of the EIA do not apply state-wide. *See, e.g.*, Tenn. Code Ann. § 49-2-201(c) (mandating that counties with populations over 700,000 cannot have school board member representing district in which he or she does not reside). Finally, the *Duncan* court did not address these purported interests when it considered a challenge to the statute less than a year ago.

VI. CONCLUSION

The right of a community to administer the education of its children is deeply rooted in our notion of a free-thinking and intelligent society. To dilute the votes of residents served by a local school board by extending the franchise to those without a substantial interest in the board's affairs is a clear infringement of that right. Where, as here, the out-of-district voters would constitute an overwhelming majority in the school board elections, there is a denial of that right in the most insidious form. Accordingly, given the undisputed factual circumstances here present, the court holds that the Equal Protection Clause of the Fourteenth Amendment proscribes the State of Tennessee from including Memphis voters in the Shelby County Board of Education electorate. In light of this holding, the court does not reach the state law issues raised by the parties.

The court therefore rules as follows:

(1) Plaintiffs' motion for summary judgment is granted;

(2) Intervening Mayors' motion for summary judgment is granted;

(3) Defendants' cross-motion for summary judgment is denied;

(4) Defendants' motion to certify state law claim of intervenors to the Tennessee Supreme Court is denied;

(5) The court declares that Tenn. Code Ann. § 49-2-201(a)(1) under the undisputed facts here presented, and as applied in light of Article XI, § 17 of the Tennessee Constitution and interpretive Tennessee Supreme Court case law to mandate the county-wide popular election of Shelby County School Board members, constitutes unlawful vote dilution in violation of the Equal Protection Clause of the Fourteenth Amendment;

(6) The court declares that the seven district plan (Plan C) approved by the Shelby County Board of County Commissioners on May 2, 1996, pursuant to Tenn. Code Ann. § 49-2-201(a)(1), is invalid; and

(7) The defendants are enjoined from implementing a county-wide election of Shelby County School Board members, and specifically from implementing Plan C.[16]

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[16] The court recognizes that the decision in this case rests upon current facts which in substance may change over time.

For the reasons discussed above,

IT IS SO ORDERED this 14th day of August, 1996.

/s/ Jerome Turner
JEROME TURNER
UNITED STATES
DISTRICT JUDGE

Nothing in this order is intended to proscribe reconsideration of this issue by a court if and when there is a substantial change in the relevant facts.

No. 96-6278

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, ET AL., Plaintiffs-Appellees,	)	
SHELBY COUNTY BOARD OF EDUCATION, ET AL., Intervenor Plaintiffs-Appellees,	)	ORDER (Filed Sep. 25, 1997)
v.	)	
CHARLES W. BURSON, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, ET AL., Defendants-Appellants.	)	

BEFORE: NELSON and NORRIS, Circuit Judges; and COHN* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

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* Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt delivered a separate concurring opinion.

MERRITT, Circuit Judge, concurring. A petition to review the panel's decision in this case has been brought under Rule 35 of the Federal Rules of Appellate Procedure. Like the majority, I voted against rehearing but write separately to express my reservations about the panel's reasoning. The panel misunderstands Tennessee law on the election of school boards and failed to properly construe the state statute in question. It therefore unnecessarily reached a federal constitutional issue.

The state statute that the panel's opinion declared "unconstitutional" on vote dilution grounds can be read as consistent with the outcome of this case. Nothing in Tennessee Code Section 49-2-201 required Shelby County to adopt county-wide elections of the Shelby County School Board; it only requires "a board of education adopted by the people." T.C.A. § 49-2-201(a)(1). In fact, subsection (c) of the provision at issue provides that "[o]nly persons who are residents of the area served by a local education agency are eligible to serve on the school board in counties" such as Shelby County. *Id.* § 49-2-201(c) (upheld as constitutional by County of *Shelby v. McWherter,* 936 S.W.2d 923, 934-36 (Tenn.App. 1996), *appeal denied* (Oct. 28, 1996)). I read this as evidence that the Tennessee legislature knew that some heavily populated counties have a municipal as well as a county school board. The Tennessee legislature therefore enacted subsection (c) to ensure that members of county school boards like Shelby County's would live in the county

outside the city, the area served by the county school board. *See also* T.C.A. § 49-2-201(d)(1)-(2) (providing special considerations for municipal school boards in counties encompassing large cities). Among Tennessee's large counties, Shelby County is the only one that currently faces this problem. Nashville has a consolidated metropolitan government, while Knoxville, Jackson, and Chattanooga have all surrendered their school charters to their respective counties.

My only concern is that the panel's opinion in this case improvidently reached its conclusion on federal constitutional grounds, when under our doctrine of federalism it should have accomplished the same result with more judicial restraint. Because Tennessee law actually supports rather than contradicts the result in this case, I agree with the decision to deny rehearing of this case en banc. I do not agree, however, that a state statute, as characterized by the panel, that purports to require county-wide voting for county school board members would be invalid under the federal constitution. But we should not have reached this issue in this case.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk